

FILED

2013 APR 16 AM 10:56

CLERK OF THE DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY [Signature] DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARK MOSS, individually and on
behalf of the Mark S. and Ellen R.
Moss Family Trust and the Mark S. &
Ellen R. Moss Charitable Remainder
Unitrust,

Plaintiff,

vs.

CHARLES J. MCLUCAS, et al.,

Defendants.

CASE NO. 12-CV-2368 BEN (KSC)
ORDER:

**(1) GRANTING YOSEMITE
CAPITAL MANAGEMENT,
LLC'S MOTION TO COMPEL
ARBITRATION AND STAY
PROCEEDINGS, OR IN THE
ALTERNATIVE, DISMISS
MOSS'S CLAIMS
[Docket No. 12]**

**(2) GRANTING CHARLES J.
MCLUCAS' AND CHARITABLE
TRUST ADMINISTRATORS,
INC.'S MOTION TO COMPEL
ARBITRATION AND TO JOIN
YOSEMITE CAPITAL
MANAGEMENT, LLC'S
MOTION TO COMPEL
ARBITRATION IN FURTHER
SUPPORT OF THIS MOTION
OR ALTERNATIVELY, FOR
STAY OF PROCEEDINGS
[Docket No. 13]**

Presently before the Court is Defendant Yosemite Capital Management, LLC's Motion to Compel Arbitration and Stay Proceedings, or in the Alternative, Dismiss Moss's Claims (Docket No. 12), and Defendants Charles J. McLucas' and Charitable Trust Administrators, Inc.'s Motion to Compel Arbitration and to Join Yosemite

1 Capital Management, LLC's Motion to Compel Arbitration in Further Support of this
2 Motion or Alternatively, for Stay of Proceedings (Docket No. 13). For the reasons
3 stated below, both Motions are **GRANTED**.

4 **BACKGROUND**

5 In 2001, Plaintiff Mark Moss retained Defendant Charles McLucas as his
6 personal investment advisor and CPA, as well as his CPA and bookkeeper for his
7 businesses comprised of various local publications. (Moss Decl. ¶ 2.) Moss
8 transferred all of his portfolio accounts to Halbert Halgrove, the investment
9 management company at which McLucas worked at the time. (*Id.*)

10 In 2003, McLucas left Halbert Halgrove and joined Defendant Yosemite Capital
11 Management, LLC as a Senior Investment Counselor. (*Id.* ¶ 3.) Moss transferred his
12 Individual Retirement Account, his Charitable Remainder UniTrust, and the Moss
13 Family Trust Account to Yosemite Capital Management, and continued to receive
14 financial advisement services from McLucas. (*Id.*) The Investment Management
15 Agreement, signed by Dr. Mark Moss, Mrs. Ellen Moss, and Mr. Paul Heckler on
16 behalf of Yosemite Capital Management and dated June 30, 2005, describes the rights
17 and duties among Yosemite Capital Management and the Mosses. (*Id.*, Exh. A.)

18 In 2006, the Mosses moved their accounts from Yosemite Capital Management
19 to The Northern Trust Company. (*Id.* ¶ 6.) On April 12, 2006, Moss provided written
20 notice to Yosemite Capital Management that he was moving his accounts to Northern
21 Trust. (*Id.* ¶ 6, Exh. D.) In May 2006, Northern Trust arranged to have all the assets
22 in the Yosemite Capital Management accounts transferred to Northern Trust. (*Id.* ¶ 7.)

23 After switching to Northern Trust, Moss still used McLucas' CPA services for
24 his personal taxes, as well as for the trusts and publications' tax preparation. (*Id.* ¶ 8.)
25 In addition, McLucas advised the Mosses on financing their tax payments. (*Id.*)

26 In 2007, McLucas approached Moss with an investment opportunity in
27 Kingsway Sales and Marketing, LLC, a company for which McLucas was the Chief
28 Financial Officer and CPA. (*Id.* ¶ 9.) Moss allegedly invested more than \$1 million

1 of his retirement funds in a general investment with Kingsway Sales and Marketing,
 2 LLC and its successor, Kingsway Industries, Inc. (collectively, "Kingsway") based on
 3 the advice and counsel of McLucas. (Compl. ¶¶ 16-19.) Plaintiff alleges that McLucas
 4 used his position of trust and confidence with Plaintiff to assure him that his
 5 investments in Kingsway were "lucrative," "safe," and "guaranteed." (*Id.* ¶¶ 16-18.)
 6 McLucas allegedly knew that Defendant David Mahrt, the owner of Kingsway, and his
 7 family were using large amounts of Kingsway's working funds for personal use as well
 8 as seeking loans from new investors to pay off previous investors and pay personal
 9 expenses. (*Id.* ¶¶ 31-32.) Plaintiff alleges that McLucas wrongfully received
 10 Plaintiff's investment funds. (*Id.* ¶ 32.)

11 On September 28, 2012, Plaintiff initiated the present action against McLucas,
 12 David Mahrt, Yosemite Capital Management, and Charitable Trust Administrators, Inc.
 13 The Complaint asserts nine claims: (1) securities fraud pursuant to 15 U.S.C. § 78j and
 14 17 C.F.R. § 240.10b-5 against McLucas and Mahrt; (2) common law fraud and deceit
 15 against McLucas and Mahrt; (3) breach of fiduciary duty against McLucas and
 16 Yosemite Capital Management; (4) professional negligence against McLucas and
 17 Yosemite Capital Management; (5) constructive fraud against McLucas and Yosemite
 18 Capital Management; (6) constructive trust against Yosemite Capital Management and
 19 Charitable Trust Administrators, Inc.; (7) conversion against McLucas and Mahrt; (8)
 20 violation of California Welfare & Institutions Code §§ 15600 *et seq.* against McLucas;
 21 and (9) violation of Business and Professions Code §§ 17200 *et seq.* against Mahrt and
 22 McLucas. The allegations in the Complaint concern Plaintiff's investments in
 23 Kingsway.

24 Presently before the Court is Yosemite Capital Management's Motion to Compel
 25 Arbitration and Stay Proceedings, or in the Alternative, Dismiss Moss's Claims
 26 (Docket No. 12), and McLucas' and Charitable Trust Administrators' Motion to
 27 Compel Arbitration and to Join Yosemite Capital Management's Motion to Compel
 28 Arbitration in Further Support of this Motion or Alternatively, for Stay of Proceedings

1 (Docket No. 13).

2 **DISCUSSION**

3 **I. INVESTMENT MANAGEMENT AGREEMENT**

4 The Court will first determine whether Defendants may compel arbitration under
 5 the Investment Management Agreement that the Mosses and Yosemite Capital
 6 Management entered into on June 30, 2005.

7 "Unless the parties clearly and unmistakably provide otherwise, the question of
 8 whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."

9 *AT & T Techs., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 649 (1986). In other
 10 words, "even the issue of arbitrability may be submitted to binding arbitration if there
 11 has been a clear demonstration that the parties contemplated it." *Agere Sys., Inc. v.*
 12 *Samsung Elecs. Co. Ltd.*, 560 F.3d 337, 339 (5th Cir. 2009) (internal alteration and
 13 quotation marks omitted); *accord Dream Theater, Inc. v. Dream Theater*, 124 Cal.
 14 App. 4th 547, 552 (2d Dist. 2004) (where the parties have contractually agreed that the
 15 issue of arbitrability is delegated to the arbitrator, the issues of arbitrability is left to the
 16 arbitrator).

17 Here, the Investment Management Agreement states:

18 The parties waive their right to seek remedies in court, including any right
 19 to a jury trial. The parties agree that any dispute between or among any
 20 of the parties arising out of, relating to or in connection with this
 21 Agreement or the Account, shall be resolved exclusively through *binding*
arbitration conducted under the auspices of JAMS pursuant to its
arbitration Rules and Procedures.

22 (Heckler Decl., Exh. A [Investment Management Agreement ¶ 18] (emphasis added).)

23 The JAMS Comprehensive Arbitration Rules and Procedures provide:

24 Jurisdictional and arbitrability disputes, including disputes over the
 25 formation, existence, validity, interpretation or scope of the agreement
 26 under which Arbitration is sought, and who are proper Parties to the
 27 Arbitration, shall be submitted to and ruled on by the Arbitrator. The
 28 Arbitrator has the authority to determine jurisdiction and arbitrability
 issues as a preliminary matter.

1 (Roppo Decl., Exh. D [JAMS Comprehensive Arbitration Rules and Procedures, Rule
 2 11(c)].)

3 Incorporation into an agreement of a set of arbitration rules which provide for
 4 the arbitrator to determine the question of arbitrability “clearly and unmistakably”
 5 indicate the parties’ agreement that the arbitrator, not the court, is to determine
 6 arbitrability. *Shaw Grp., Inc. v. Triplefine Int’l Corp.*, 322 F.3d 115, 122 (2d Cir.
 7 2003); *see also Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205, 208 (2d Cir.
 8 2005) (holding incorporation of American Arbitration Association rules clearly and
 9 unmistakably evidenced intent for arbitrator to decide the issue of arbitrability);
 10 *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372-73 (Fed. Cir. 2006) (same).

11 Here, the Investment Management Agreement incorporates the JAMS
 12 Comprehensive Arbitration Rules and Procedures. The JAMS Comprehensive
 13 Arbitration Rules and Procedures, in turn, provide for the arbitrator to determine the
 14 question of arbitrability. Accordingly, the parties “clearly and unmistakably” indicate
 15 their agreement that the arbitrator is to determine arbitrability.

16 Plaintiff argues that the agreement to arbitrate terminated a year before any of
 17 the events which form the basis of the complaint occurred. According to Plaintiff,
 18 Moss terminated his relationship with Yosemite Capital Management in 2006. A year
 19 later, Plaintiff argues, a new relationship was formed between McLucas, Yosemite
 20 Capital Management, and Moss, to which the Investment Management Agreement no
 21 longer applied. As set forth in JAMS Rule 11(c), however, issues of formation,
 22 existence, validity, interpretation, and scope of the arbitration agreement are to be
 23 determined by the arbitrator, not the court. The issue Plaintiff raises goes to the issue
 24 of arbitrability. *See Agere Sys.*, 560 F.3d at 340 (holding that the question of whether
 25 an agreement to arbitrate had expired was an issue of arbitrability left for the arbitrator
 26 where the parties clearly contemplated for the arbitrator to decide the issue of
 27 arbitrability). Defendants may compel arbitration under the Investment Management
 28 Agreement.

1 **II. INDIVIDUAL DEFENDANTS**

2 The Court has determined that the Investment Management Agreement "clearly
3 and unmistakably" indicates the parties' agreement that the arbitrator is to determine
4 arbitrability. Now the Court must determine which individual defendants may compel
5 arbitration under the Investment Management Agreement. The Court will address
6 each Defendant in turn.

7 **A. Yosemite Capital Management**

8 The Investment Management Agreement was signed by Dr. Mark Moss, Mrs.
9 Ellen Moss, and Mr. Paul Heckler on behalf of Yosemite Capital Management. (Moss
10 Decl., Exh. A, at 5.) Because Yosemite Capital Management is a party to the
11 Investment Management Agreement, it may compel arbitration against Plaintiff.
12 Yosemite Capital Management's motion to compel arbitration is **GRANTED**.

13 **B. Charles McLucas**

14 McLucas did not sign the Investment Management Agreement, but he is an
15 employee of Yosemite Capital Management, which is a signatory of the Investment
16 Management Agreement. An employee may compel arbitration based on an
17 arbitration agreement entered into by his employer. *Harris v. Superior Court*, 188 Cal.
18 App. 3d 475, 478 (2d Dist. 1986). Accordingly, McLucas may compel arbitration
19 against Moss as a non-signatory beneficiary of the Investment Management
20 Agreement. *See Dryer v. L.A. Rams*, 40 Cal. 3d 406, 418 (1985). McLucas' motion
21 to compel arbitration is **GRANTED**.

22 **C. Charitable Trust Administrators**

23 Charitable Trust Administrators is not a signatory to the Investment
24 Management Agreement. Nonetheless, Charitable Trust Administrators seeks to join
25 Yosemite Capital Management's Motion to Compel Arbitration on the basis that
26 Moss's claims against Charitable Trust Administrators are founded upon an identical
27 set of facts as those alleged against McLucas. Alternatively, Charitable Trust
28 Administrators seeks to stay the action against Charitable Trust Administrators

1 pending the outcome of an arbitration proceeding.

2 Charitable Trust Administrators does not cite any authority for the proposition
 3 that it should be allowed to compel arbitration against Moss because Moss's claims
 4 against Charitable Trust Administrators are founded upon an identical set of facts as
 5 those alleged against McLucas. Accordingly, Charitable Trust Administrators' motion
 6 to compel arbitration is **DENIED**.

7 **D. David Mahrt**

8 Mahrt is not a signatory to the Investment Management Agreement. Defendant
 9 argues that because Plaintiff alleged that Mahrt and McLucas "formed a conspiracy
 10 to do all the wrongful acts alleged in this Complaint" and that they had "knowledge
 11 of, and agreed to, all courses of action alleged herein" (Compl. ¶ 12), Mahrt has a right
 12 to enforce the arbitration agreement against Moss as an alleged agent of McLucas.

13 "[W]hen a plaintiff alleges a defendant acted as an agent of a party to an
 14 arbitration agreement, the defendant may enforce the agreement even though
 15 defendant is not a party thereto." *Thomas v. Westlake*, 204 Cal. App. 4th 605, 614 (4th
 16 Dist. 2012). Plaintiff, however, does not allege that Mahrt is an agent of McLucas.
 17 Rather, Plaintiff alleges that Mahrt and McLucas "formed a conspiracy." Defendant
 18 has not cited any authority holding that a third party may compel arbitration when it
 19 has been alleged to be a co-conspirator with a signatory to an agreement to arbitrate.
 20 Accordingly, Defendant's motion to compel arbitration as to Mahrt is **DENIED**.

21 **III. CALIFORNIA CODE OF CIVIL PROCEDURE § 1281.2**

22 The Court has determined that Yosemite Capital Management and McLucas
 23 may compel arbitration against Moss. However, Charitable Trust Administrators and
 24 Mahrt may not compel arbitration. Plaintiff argues that because only some of the
 25 defendants may compel arbitration, the Court should decline to enforce the arbitration
 26 agreement under California Code of Civil Procedure § 1281.2(c)(1).

27 California Code of Civil Procedure § 1281.2 provides, "On petition of a party
 28 to an arbitration agreement alleging the existence of a written agreement to arbitrate

1 a controversy and that a party thereto refuses to arbitrate such controversy, the court
2 shall order the petitioner and the respondent to arbitrate the controversy if it
3 determines that an agreement to arbitrate the controversy exists.” However, if the
4 court determines that “[a] party to the arbitration agreement is also a party to a pending
5 court action or special proceeding with a third party, arising out of the same
6 transaction or series of related transactions and there is a possibility of conflicting
7 rulings on a common issue of law or fact,” the court may

(1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

¹³ || CAL. CODE CIV. P. § 1281.2(c).

14 Here, because this action arises out of a series of transactions that involves both
15 signatories and non-signatories to the arbitration agreement, there is a possibility of
16 conflicting rulings on common issues of law or fact. To avoid any conflicting rulings,
17 the Court will exercise its discretion to **STAY** the action as to Charitable Trust
18 Administrators and Mahrt while the arbitration involving Moss, Yosemite Capital
19 Management, and McLucas proceeds. *See Cronus Invs., Inc. v. Concierge Servs.*, 35
20 Cal. 4th 376, 393 (2005).

CONCLUSION

22 For the foregoing reasons, Yosemite Capital Management's Motion to Compel
23 Arbitration and Stay Proceedings, or in the Alternative, Dismiss Moss's Claims is
24 **GRANTED**, and McLucas' and Charitable Trust Administrators' Motion to Compel
25 Arbitration and to Join Yosemite Capital Management's Motion to Compel Arbitration
26 in Further Support of this Motion or Alternatively, for Stay of Proceedings is
27 **GRANTED**. Yosemite Capital Management, McLucas, and Moss are **ORDERED**
28 to proceed immediately to arbitration. The Court shall retain jurisdiction to enforce

1 any award. This action is **STAYED** as to Charitable Trust Administrators and Mahrt
2 pending arbitration.

3 **IT IS SO ORDERED.**

4

5 DATED: April 15, 2013

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

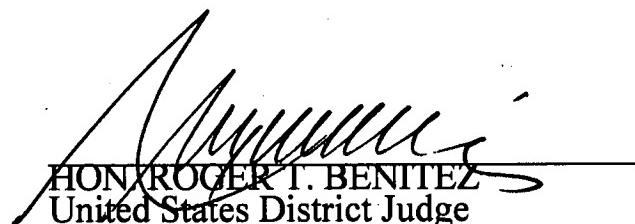
24

25

26

27

28


HON. ROGER T. BENITEZ
United States District Judge